DISSENTING VIEWS

H.J. Res. 10, the so-called "Flag Protection Amendment," would mark the first time in our nation's history that the Constitution has ever been amended in order to curtail an existing right. In this instance, the proposed amendment would narrow the scope of the First Amendment's protection of free expression by allowing Congress to enact legislation prohibiting "physical desecration" of the flag of the United States. This dangerous and unnecessary assault on our fundamental liberties would set a terrible precedent. For the reasons set out below, we respectfully dissent.

BACKGROUND

This Constitutional amendment is a response to a pair of Supreme Court decisions, *Texas v. Johnson,* 491 U.S. 397 (1989) and *United States v. Eichman,* 496 U.S. 310 (1990), in which the Court held that state and Federal Government efforts to prohibit physical "desecration" of the flag by statute were content-based political speech restrictions and imposed unconstitutional limitations on that speech.[1]

The first flag desecration statutes originated in the States in the late 19th century after supporters failed to obtain Federal legislation prohibiting commercial or political "misuse" of the flag. During the period between 1897 and 1932, flag desecration statutes were enacted in every state. These statutes outlawed the use of the flag for a number of purposes, including commercial advertising, marking the flag for political, commercial or other purposes, or publicly mutilating, trampling, defacing, defiling or casting contempt, by words or action, upon the flag.[2]

Congress remained relatively silent on the issue throughout that period, approving the first Federal flag desecration law in 1968 in the aftermath of a highly publicized Central Park flag burning incident in protest against the Vietnam War. The 1968 Federal law made it illegal to "knowingly" cast "contempt" upon "any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it."[3] The law imposed a penalty of up to $1,000 in fines and/or 1 year in prison.

Shortly after passage of the 1968 law, the Supreme Court considered three notable cases concerning the flag; however, none of these decisions directly addressed the flag burning issue. In *Street v. New York,*[4] the Court ruled that New York could not convict a person for making verbal remarks disparaging the flag. In 1972,

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[1] The proposed amendment reads, in its relevant part, "The Congress shall have power to prohibit the physical desecration of the flag of the United States." H.J. Res. 10 109th Cong. (2005).

[2] Most of these statutes were eventually struck down as unconstitutional in a series of lower court decisions, usually on the grounds of vagueness.

[3] Pub. L. 90–381, Sec. 1, 82 Stat. 291 (1989)(18 U.S.C. 700).

[4] 394 U.S. 576 (1969).

the Court ruled in *Smith v. Goguen,*[5] that Massachusetts could not prosecute a person for wearing a small cloth replica of the flag on the seat of his pants based on a state law making it a crime to publicly treat the U.S. flag with "contempt." The Court ruled that the law was unconstitutionally vague. In *Spence v. Washington,*[6] the Court overturned a Washington state "improper use" flag law, which, among other things, barred placing any marks or designs upon the flag or displaying such altered flags in public view. These decisions intimated, but did not expressly hold, that flag burning for political purposes constituted protected activity under the First Amendment.

In 1989, the Supreme Court addressed directly whether a flag burning statute violates the First Amendment in *Texas v. Johnson.*[7] The Court determined that the First Amendment protects those citizens who burn the U.S. flag in political protest from prosecution. In that case, Gregory Johnson was arrested for burning the U.S. flag in violation of Texas' "Venerated Objects" law[8] during a demonstration outside of the Republican National Convention in Dallas. The Texas statute outlawed "intentionally or knowingly" desecrating a "national flag." According to the statute, the term "desecrate" was defined to mean "to deface, damage or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover *his action.*"[9] The Court of Appeals for the Fifth District of Texas upheld Johnson's conviction.[10] Texas' highest criminal court, the Court of Criminal Appeals, reversed the lower court decision, holding that the Texas law had been unconstitutionally applied to Johnson in violation of his First Amendment rights.[11]

The Supreme Court affirmed the Texas Court of Criminal Appeals ruling. The Court found that Johnson's conduct constituted symbolic expression which was both intentional and overtly apparent. The Court determined that, since Johnson's guilt depended on the communicative aspect of his expressive conduct, and was restricted because of the content of the message he conveyed, the Texas statute was "content-based" and subject to "the most exacting scrutiny test" outlined in *Boos v. Barry.*[12] Further, the Court stated that, although the government has an interest in encouraging proper treatment of the flag, it may not criminally punish a person for burning a flag as a means of political protest.[13] The Court determined that the Texas statute was designed to prevent citizens from conveying "harmful" messages, reflecting a government interest that violated the First Amendment principle that government may not prohibit expression of an idea simply because it finds the idea itself offensive or disagreeable.[14]

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[5] 415 U.S. 566 (1974).
[6] 418 U.S. 405 (1974).
[7] 491 U.S. 397 (1989).
[8] Tex. Penal Code Ann. §42.09(a)(3) (1989).
[9] Tex. Penal Code Ann. §42.09(b) (1989).
[10] 706 S.W. 2d 120 (1986).
[11] 755 S.W. 2d 92 (1988).
[12] 485 U.S. 312 (1988).
[13] The Court ruled that Texas' proffered interest of preventing breaches of the peace was not implicated and that its interest in preserving the flag as a symbol of nationhood and national unity was related to the suppression of expression.
[14] Certain uses of the flag are misdemeanors under 4 U.S.C. 3, punishable by a fine of not more than $100 or imprisonment of not more than thirty days or both. Acts criminalized under

In response to the *Johnson* ruling, Congress took steps to amend the 1968 statute to make it "content neutral" by passing the "Flag Protection Act of 1989."[15] The Act prohibited flag desecration under all circumstances by removing the statutory requirement that the conduct cast contempt upon the flag. The statute also defined the term "flag" in an effort to avoid any latent First Amendment vagueness problems.[16] Following passage of the Act, a wave of the flag burnings took place in over a dozen cities. The first Bush administration decided to test the Flag Protection Act by bringing criminal charges against protesters who participated in two incidents, one in Seattle and the other in Washington, DC.[17] In both cases, the Federal district courts relied on *Johnson,* striking down the 1989 law as unconstitutional when applied to political protesters.

The Supreme Court accepted jurisdiction of these cases (consolidated as *U.S. v. Eichman,* 496 U.S. 310 (1990)) and, in a 5–4 decision, upheld the lower Federal court rulings and struck down the Flag Protection Act of 1989.[18] Again, the Court ruled that the government's stated interest in protecting the status of the flag "as a symbol of our Nation and certain national ideals" was related to "the suppression of free expression" that gave rise to an infringement of First Amendment rights. The Court acknowledged that the 1989 law, unlike the Texas statute in Johnson, contained no content-based limitations on the scope of protected conduct. However, the Court determined, the Federal statute was subject to strict scrutiny because it could not be enforced *without* reference to the message of the "speaker."

Since the *Eichman* decision, Congress repeatedly considered and rejected a proposed Constitutional amendment specifying that "the Congress and the states have the power to prohibit the physical desecration of the flag of the United States."

I. THE AMENDMENT WAS NOT SUBJECT TO EVEN PRO FORMA HEARINGS:

Historically, Congress has treated the Constitutional amendment process as a remedy of last resort. Although numerous amendments to the Constitution have been proposed, it has been a power

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existing Federal law include: using the flag in "advertising of any nature," or any person who "shall manufacture, sell expose for sale, or to pubic view, or give away or use for an purpose, any article or substance being an article of merchandise or a receptacle for merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed a presentation of any such flag, standard, colors, or ensign, to advertise, call attention to, decorate, mark, or distinguish the article or substance on which so placed. . . ." Although not enforceable under current precedents, these restrictions would become fully enforceable against businesses, individuals and any Member of Congress using the flag in a campaign ad, should the amendment be ratified. A formal representation of the exact flag is not required. The existing statute includes in the definition of "flag," "any picture or representation of either, or any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America or a picture or a representation of either, upon which shall be shown the colors, the stars and stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag. . . ."

[15] Pub. L. No. 101–131 (1989).

[16] The Flag Protection Act of 1989 defined "flag" as "any flag of the United States, or any part thereof, make of any substance, of any size, in a form that is commonly displayed." 18 U.S.C. 700.

[17] The Washington, DC, protest occurred on the steps of the Capitol.

[18] *U.S. v. Eichman,* 496 U.S. 310 (1990) (consolidating No. 89–1433, *U.S. v. Eichman,* 731 F.Supp. 1123 (D.D.C. 1990), and *U.S. v. Haggerty,* 731 F.Supp. (W.D.WA. 1990)).

used rarely and with great care. Over more than 200 years, our Constitution has been amended only 27 times. If ratified, H.J. Res. 10 would, for the first time in our Nation's history, modify the Bill of Rights to limit freedom of expression.

Notwithstanding the gravity of the issue, the majority has decided that this unprecedented departure from our nation's constitutional heritage does not even merit the otherwise *pro forma* hearings that have become the rule since the 107th Congress.

The Committee did not hold a single hearing on this momentous question. The Subcommittee on the Constitution held neither a hearing nor a markup. This reckless disregard for the future of our Bill of Rights is nothing less that a complete abdication of the Committee's core duty under Rule X of the Rules of the House, and the oath every member takes on assuming office to "support and defend the Constitution of the United States against all enemies, foreign and domestic; [to] bear true faith and allegiance to the same . . . and [to] well and faithfully discharge the duties of the office on which I am about to enter. . . ."[19]

In an effort to give the Committee the opportunity of at least one hearing on this momentous issue, Mr. Conyers made a motion to postpone further consideration of the proposed amendment until June 15, 2005. Due to an erroneous ruling by the Committee's Parliamentarian, the Chairman called a vote of the Committee without debate on the motion. The motion was defeated on a party line vote of 12 Ayes and 20 Nays. Mr. Nadler then offered a motion to postpone further consideration until June 16, 2005. Following debate, the motion was defeated on a party line vote of 11 Ayes and 19 Nays.

We believe that it is irresponsible to amend the Bill of Rights without a hearing, even if, as the Chairman believes, "having a hearing on this amendment will simply have everybody validating the arguments that have been made both pro and con in hearings that have been held before the subcommittee in previous Congresses. If there were new arguments, I'd like to hear them. But since there aren't, we don't need to have another hearing."[20] We do not share the Chairman's confidence that there is nothing to learn from a hearing. It is our job to approach important questions with open minds and seek information, not to shun it. It is certainly inappropriate for the majority to prejudge a question of this importance.

In fact, the Committee received numerous written comments in opposition to the proposed amendment. These comments were made a part of the record during the markup. We sincerely doubt any member had the opportunity to review, much less consider, these helpful comments before voting.[21]

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[19] 5 U.S.C. 3331.

[20] H.Rpt. No. 109-____ at ____ (2005)(Statement of Rep. F. James Sensenbrenner).

[21] Letter from Gregory T. Nojeim, Acting Director, and Terri A. Schroeder, Senior Lobbyist, *American Civil Liberties Union*, to Members of the U.S. House of Representatives (May 23, 2005); Letter from Gary E. May, *Veterans Defending the Bill of Rights*, to Members of the U.S. House of Representatives (May 24, 2005); Letter from *Veterans for Common Sense*, to Members of the U.S. House of Representatives (May 24, 2005); Letter from former Captain Jeremy Broussard (U.S. Army) to Rep. F. James Sensenbrenner, Jr., and Rep. John Conyers, Jr. (May 24, 2005); Letter from Maj. Robert A. Cordes (USAF, Ret.) to Members of the U.S. Senate (March 10, 2004); Letter from Bruce Fein, Esq. to Sen. Orrin Hatch and Sen. Patrick Leahy (June 7, 2004); Letter from Lt. Gen. Robert G. Gard, Jr. (U.S. Army, Ret.) to Sen. Orrin Hatch and Sen. Patrick Leahy (March 8, 2004); Letter from William C. Ragsdale (U.S. Navy, Ret.) to

II. THE PROPOSED AMENDMENT WOULD ABRIDGE FREE EXPRESSION:

Proponents of the amendment argue that desecration of the flag should not be considered speech within the meaning of First Amendment. Yet it is precisely the expressive content of acts involving the flag that the amendment would target. Indeed, it appears that proponents of the amendment sometimes wish to have it both ways. For example, an amendment offered by Rep. Scott replacing the word "desecration" with the word "burning" was rejected precisely because it would have prohibited the destruction of a flag in a purely content neutral manner.[22] As Chairman Chabot observed:

> Limiting the amendment to only the burning of the flag rather than desecration would unduly limit the object and purpose of this resolution to give Congress the power to protect the flag from a range of physical acts of defilement or defacement. The word "desecration" was selected to give Congress the power to protect the flag from a range of physical acts of defilement or defacement. The word "desecration" was selected because of its broad nature encompassing many actions against the flag.[23]

That the criminal sanctions against flag burning in the *Johnson* case, and the ones the sponsors of this amendment would presumably seek to enact upon its adoption, are directly related to the expressive content of the act are clear. Current law prescribes that "[t]he flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning."[24] It is clear then, that prohibitions against flag burning or "physical desecration" are fundamentally content-based. Burning a flag to demonstrate respect or patriotism is prescribed by current law. Should the proposed amendment pass, burning the flag to convey a political viewpoint of dissent or anger at the United States would become a crime.

The Framers of the Constitution saw dissent and its protection as an affirmative social good.[25] Limits on the manner of form of dissent must inevitably translate into limits on the content of the dissent itself. Limitations on the use of the flag in political demonstrations ultimately undermines the freedoms the flag represents.

There can be no doubt that "symbolic speech" relating to the flag falls squarely within

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Sen. Orrin Hatch and Sen. Patrick Leahy (March 10, 2004); Letter from Steven E. Sanderson (U.S. Army veteran) to Members of the Senate Committee on the Judiciary (March 8, 2004); Letter from Lt. Gen. Claudia J. Kennedy (USA, Ret.) to Rep. F. James Sensenbrenner, Jr., and Rep. John Conyers, Jr. (May 24, 2005).

[22] The term "desecration" itself is highly revealing. Webster's New World Dictionary defines "desecrate" as "to violate the sacredness of," and in turn defines "sacred" as "consecrated to a god or God; holy; or having to do with religion." Proponents of the amendment use similar language in defending the proposal.

[23] H.Rpt. No. 109-____ at ____ (2005)(statement of Rep. Chabot).

[24] 4 U.S.C. 8(k).

[25] "[T]hose who are resentful because their interests are not accorded fair weight, and who may be doubly resentful because they have not even had a chance to present those interests, may seek to attain by radical changes in existing institutions what they have failed to get from the institutions themselves. Thus liberty of expression, though often productive of divisiveness, may contribute to social stability." Kent Greenwalt, *Speech and Crime,* Am. B. Found. Res. J. 645, 672–3 (1980).

the ambit of traditionally protected speech. Our nation was borne in the dramatic symbolic speech of the Boston Tea Party. Moreover, our courts have long recognized that expressive speech associated with the flag is protected speech under the First Amendment.

Beginning in 1931 with *Stromberg v. California*[26] and continuing through the mid-1970's with *Smith v. Goguen*[27] and *Spence v. Washington,*[28] the Supreme Court has consistently recognized that flag-related expression is entitled to constitutional protection. Indeed, by the time Gregory Johnson was prosecuted for burning a U.S. flag outside of the Republican Convention in Dallas, the State of Texas readily acknowledged that Johnson's conduct constituted "symbolic speech" subject to protection under the First Amendment.[29] Those who seek to justify H.J. Res. 10 on the grounds that flag desecration does not constitute "speech" are therefore denying decades of well understood law.[30]

While we deplore the burning of an American flag in hatred, we recognize that it is our allowance of this conduct that reinforces the strength of the Constitution. As one Federal court wrote in a 1974 flag burning case, "[T]he flag and that which it symbolizes is dear to us, but not so cherished as those high moral, legal, and ethical precepts which our Constitution teaches."[31]

The genius of the *Constitution* lies in its indifference to a particular individual's cause. The fact that flag burners are able to take refuge in the First Amendment means that every citizen can be assured that the Bill of Rights will be available to protect his or her rights and liberties should the need arise.

H.J. Res. 10 will also open the door to selective prosecution based purely on political beliefs. When John Peter Zenger was charged with "seditious libel" in the very first case involving freedom of speech on American soil, his lawyer, James Alexander warned:

> The abuses of freedom of speech are the excrescences of Liberty. They ought to be suppressed; but whom dare we commit the care of doing it? An evil Magistrate, entrusted with power to punish Words, is armed with a Weapon the most destructive and terrible. Under the pretense of pruning the exuberant branches, he frequently destroys the tree.[32]

The history of the prosecution of flag desecration in this country bears out these very warnings. The overwhelming majority of flag desecration cases have been brought against political dissenters,

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[26] 283 U.S. 359 (1931) (State statute prohibiting the display of a 'red flag' overturned). Absent this decision, a State could theoretically have prevented its citizens from displaying the U.S. flag.

[27] 415 U.S. 94 (1972).

[28] 418 U.S. 405 (1974) (overturning convictions involving wearing a flag patch and attaching a peace sign to a flag).

[29] *Texas v. Johnson,* 491 U.S. at 397.

[30] See also, Note, *The Supreme Court—Leading Cases,* 103 Harv. L. Rev. 137, 152 (1989) ("the majority opinion [in Johnson] is a relatively straightforward application of traditional first amendment jurisprudence"); Sheldon H. Nahmod, *The Sacred Flag and the First Amendment,* 66 Ind. L.J. 511, 547 (1991) ("*Johnson* is an easy case if well-established first amendment principles are applied to it"). Survey results show that the majority of Americans who initially indicate support for a flag protection amendment oppose it once they understand its impact on the Bill of Rights. In a 1995 Peter Hart poll, 64 percent of registered voters surveyed said they were in favor of such an amendment, but when asked if they would oppose or favor such an amendment if they knew it would be the first in our Nation's history to restrict freedom of speech and freedom of political protest, support plummeted from 64 percent to 38 percent.

[31] *U.S. ex rel Radich v. Criminal Court of N.Y.,* 385 F. Supp. 165, 184 (1974).

[32] PHILADELPHIA GAZETTE, Nov. 17, 1737, quoted in Levy, *Legacy of Suppression* 135 (1960).

while commercial and other forms of flag desecration have been almost completely ignored. An article in *Art in America* points out that during the Vietnam War period, those arrested for flag desecration were "invariably critics of national policy, while 'patriots' who tamper with the flag [were] overlooked."[33] Whitney Smith, director of the Flag Research Center has further observed that commercial misuse of the flag was "more extensive than its misuse by leftists or students, but this is overlooked because the business interests are part of the establishment."[34]

Almost as significant as the damage H.J. Res. 10 would do to our own Constitution is the harm it will inflict on our international standing in the area of human rights. To illustrate, when the former Soviet Union adopted legislation in 1989 making it a criminal offense to "discredit" a public official, Communist officials sought to defend the legislation by relying on, among other things, the United States Flag desecration statute.[35] Demonstrators who cut the communist symbols from the center of the East German and Romanian flags prior to the fall of the Iron Curtain committed crimes against their country's laws similar to the this Act. Americans justifiably applauded these brave actions as political speech, understanding the injustice of the laws of those regimes. If we are to maintain our moral stature in matters of human rights, it is essential that we remain fully open to unpopular dissent, regardless of the form it takes.[36] By adopting H.J. Res 10 we will be unwittingly encouraging other countries to enact and enforce other more restrictive limitations on speech, while impairing our own standing to protest such actions.

III. AMENDING THE CONSTITUTION TO LIMIT THE BILL OF RIGHTS SETS A DANGEROUS PRECEDENT:

Adoption of H.J. Res. 10 will also create a number of dangerous precedents in our legal system. The Resolution will encourage further departures from the First Amendment and diminish respect for our Constitution. As President Reagan's Solicitor General Charles Fried testified in 1990:

> Principles are not things you can safely violate "just this once." Can we not just this once do an injustice, just this once betray the spirit of liberty, just this once break faith with the traditions of free expression that have been the glory of this nation? Not safely; not without endangering our immortal soul as a nation. The man who says you can make an exception to a principle, does not know what a principle is; just as the man who

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[33] *See* Robert J. Goldstein, *Two Centuries of Flagburning in the United States,* 163 Flag Bull. 65, 154 (1995).

[34] *Id.*

[35] Rotunda, *Treatise on Constitutional Law: Substance and Procedure* §20.49 at 352 (2d ed. 1992).

[36] *See Hearing on H.J. Res. 54, Proposing an Amendment to the Constitution of the United States Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 105th Cong., 2nd Sess. (April 30, 1997) [hereinafter *1997 House Judiciary Hearings*] (statement of PEN American Center, Feb. 5, 1997) ("To allow for the prosecution of [flag burners] would be to dilute what has hitherto been prized by Americans everywhere as a cornerstone of our democracy. The right to free speech enjoys more protection in our country than perhaps any other country in the world.").

says that only this once let's make 2 + 2 = 5 does not know what it is to count.[37]

Amending the Constitution, particularly concerning issues which inflame public passion, represents a clear and present danger to our core liberties.[38] Conservative legal scholar Bruce Fein emphasized this concern when he testified before the Subcommittee at 1995 House Judiciary hearings:

> While I believe the *Johnson* and *Eichman* decisions were misguided, I do not believe a Constitutional amendment would be a proper response. . . . To enshrine authority to punish flag desecrations in the Constitution would not only tend to trivialize the Nation's Charter, but encourage such juvenile temper tantrums in the hopes of receiving free speech martyrdom by an easily beguiled media. . . . It will lose that reverence and accessibility to the ordinary citizen if it becomes cluttered with amendments overturning every wrong-headed Supreme Court decision.[39]

Professor Norman Dorsen also points out in his testimony, "not including the Bill of Rights, which was ratified in 1791 as part of the original pact leading to the Constitution, only 17 amendments have been added to it, and very few of these reversed constitutional decisions of the Supreme Court. To depart from this tradition now . . . would be an extraordinary act that could lead to unpredictable mischief in coming years."[40]

IV. FLAG BURNING RARELY OCCURS:

H.J. Res. 10 responds to a perceived problem—flag burning—that is all but nonexistent in American life today. Studies indicate that in all of American history from the adoption of the United States flag in 1777 through the *Texas v. Johnson*[41] decision in 1989 there were only 45 reported incidents of flag burning.[42] Experience with prior efforts to criminalize flag desecration indicates that imposing such penalties have actually instigated flag burning.[43]

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[37] *Measures to Protect the American Flag, 1990: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. (June 21, 1990) (statement of Charles Fried at 113).

[38] Legal philosopher Lon Fuller also highlighted this very problem over four decades ago: "We should resist the temptation to clutter up [the Constitution with amendments relating to substantive matters. In that way we avoid] . . . the obvious unwisdom of trying to solve tomorrow's problems today. But [we also escape the] more insidious danger of the weakening effect [such amendments] have on the moral force of the Constitution itself." L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J.L. Ed. 457, 465 (1954), as cited in *Proposed Flag Desecration Amendment 1995: Hearing Before the Subcomm. on Constitution of the Senate Comm. on the Judiciary*, 104th Cong. (June 6, 1995) [hereinafter, 1995 *Senate Judiciary Hearings*] (statement of Gene R. Nichol).

[39] *See Proposing an amendment to the Constitution of the United States authorizing the Congress and the States to prohibit the physical desecration of the flag of the United States, 1995: Hearing on H.J. Res. 79, Before the Subcomm. on Constitution of the House Comm. on the Judiciary*, 104th Cong.(1995) [hereinafter, *1995 House Judiciary Hearings*] (statement of Bruce Fein, at 1).

[40] *See 1997 House Judiciary Hearings, supra* note 35 (statement of Professor Norman Dorsen, New York University School of Law).

[41] *See supra* at 3–5.

[42] Robert J. Goldstein, *Two Centuries of Flagburning in the United States*, 163 Flag Bull. 65 (1995).

[43] In his extensive survey of the history of American flag desecration law, Robert Goldstein writes that "[a]lthough the purpose of the [Flag Protection Act adopted by Congress in 1968] was to supposedly end flag burnings, its immediate impact was to spur perhaps the largest single wave of such incidents in American history." Robert J. Goldstein, *Saving "Old Glory": The History of the American Flag Desecration Controversy* 215 (1995).

In addition to the relative infrequency of flag burning, proponents of the measure cast the current state of the law as though Congress is impotent to protect the flag. However, even witnesses who disagree with the Supreme Court rulings in *Johnson* and *Eichman* have stated that the impact of those cases was not so broad. In 1995, Bruce Fein stated as much in subcommittee hearings: "Flag desecrations when employed as 'fighting words' or when intended and likely to incite a violation of law remain criminally punishable under the Supreme Court precedents in *Chaplinsky v. New Hampshire* and *Brandenburg v. Ohio.*"[44]

V. THIS AMENDMENT IS THE WRONG WAY TO HONOR OUR VETERANS:

It is a mistake to argue that this amendment honors the courage and sacrifice of our veterans. While we condemn those who would dishonor our nation's flag, we believe that rather than protecting the flag, H.J. Res. 10 will merely serve to dishonor the Constitution and to betray the very ideals for which so many veterans fought, and for which so many members of our armed forces made the ultimate sacrifice. General Colin L. Powell echoed this sentiment:

> The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away.[45]

Jim Warner, a Vietnam veteran and prisoner of the North Vietnamese from October 1967 to March 1973, has written:

> The fact is, the principles for which we fought, for which our comrades died, are advancing everywhere upon the Earth, while the principles against which we fought are everywhere discredited and rejected. The flag burners have lost, and their defeat is the most fitting and thorough rebuke of their principles which the human could devise. Why do we need to do more? An act intended merely as an insult is not worthy of our fallen comrades. It is the sort of thing our enemies did to us, but we are not them, and we must conform to a different standard. . . . Now, when the justice of our principles is everywhere vindicated, the cause of human liberty demands that this amendment be rejected. Rejecting this amendment would not mean that we agree with those who burned our flag, or even that they have been forgiven. It would, instead, tell the world that freedom of expression means freedom, even for those expressions we find repugnant.[46]

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[44] *1995 House Judiciary Hearings, supra* note 39 (statement of Bruce Fein at 1–2).

[45] Letter from General Colin L. Powell to Hon. Patrick Leahy, May 18, 1999.

[46] *See 1997 House Judiciary Hearings, supra* note 35 (statement of Jim Warner). These thoughts are echoed by Terry Anderson, a former U.S. Marine Staff Sergeant and Vietnam veteran who was held hostage in Lebanon. In testimony submitted at the same hearing, he wrote that "[H.J. Res. 54] is an extremely unwise restriction of every American's Constitutional rights. The Supreme Court has repeatedly held that the First Amendment protects symbolic acts under its guarantee of free speech. Burning or otherwise damaging a flag is offensive to many (including me), but it harms no one and is so obviously an act of political speech that I'm amazed anyone could disagree with the Court." (*Id.* statement of Terry Anderson).

There are many ways Congress can honor veterans. First and foremost, we can ensure that programs designed to protect them and provide them with much needed assistance are properly funded. During the Full Committee markup of H.J. Res. 10 on May 25, 2005, Ms. Lofgren offered an amendment that would have provided for such proper programming and funding. Ms. Lofgren proposed that H.J. Res. 10 would not take effect until Congress guaranteed that veteran's benefits promised to an individual in connection with that individual's enlistment or induction in the Armed Forces could not be diminished after enlistment or induction. Unfortunately, this Committee, with this Administration and the Republican majority, have chosen to honor veterans with symbolic legislation, rather than tending to the needs of our veterans, our service men and women in the field, and their families.

Yet this year's budget short-changes our veterans in vital areas such as health care. The President's proposed budget, providing $31.4 billion for appropriated veterans' programs, is a staggering $338 million below the amount that the Congressional Budget Office estimates is needed to maintain services at the 2005 level. As the Disabled American Veterans observed:

> The Administration's budget for fiscal year (FY) 2006 seeks only $27.8 billion in appropriations for veterans' medical care. This amounts to only a 0.4%—or less than one-half of 1 percent—increase over the FY 2005 appropriation in nominal, or constant, dollars, and therefore would be a reduction below the FY 2005 appropriation of $27.7 billion adjusted for inflation. The Administration's budget would tighten funding for veterans' medical care at a time when an influx of new veterans from the wars in Iraq and Afghanistan will place substantial new demands upon a system already unable to meet its mission. With the FY 2005 appropriation, the Department of Veterans Affairs (VA) had to maintain a freeze on new enrollments of lower priority group veterans seeking medical care, and even with that freeze, VA medical facilities across the Nation are already experiencing shortfalls in FY 2005 funding. These shortfalls prevent the hiring of new health care employees and new equipment purchases. The Independent Budget, coauthored by the Disabled American Veterans, AMVETS, the Paralyzed Veterans of America, and Veterans of Foreign Wars, estimates that Congress must appropriate $31.2 billion for veterans' medical care in FY 2006 just to maintain current service levels.[47]

Rep. David Obey attempted to add an additional $2.6 billion to the FY 2006 Military Quality of Life and Veterans Affairs bill,[48] but his amendment was rejected by the Appropriations Committee. As Rep. Obey argued:

> We also have a moral obligation to point out at every opportunity that the reason why veterans will not be receiving the health care they deserve is because of the misbegotten, ill-ad-

[47] Disabled American Veterans, *To Maintain Essential Services for Veterans, Congress Must Provide Adequate Funding,* (visited June 3, 2005) <http://www.dav.org/voters/legislative—talking—points.html>.

[48] H.R. 2528,109th Congress (2005).

vised budget that the Republican Congress passed just a few short weeks ago. That budget, which only one Republican member of the Appropriations Committee opposed, is the reason that veterans will not receive the health care that they were promised and that they deserve.[49]

CONCLUSION

Adoption of H.J. Res. 10 will undermine our commitment to freedom of expression and do real damage to the constitutional system established by our forefathers. If we amend the Constitution to outlaw flag desecration, we will be joining ranks with countries such as China, Iran and the former Soviet Union.[50] We believe we have come too far as a nation to risk jeopardizing our commitment to freedom in such a fruitless endeavor to legislate patriotism. As the Court wrote in *West Virginia State Board of Education v. Barnette:*

> [The] ultimate futility of . . . attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means of Russian unity, down to the last failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[51]

If we adopt H.J. Res. 10, we will be denigrating the vision of Madison and Jefferson. If we tamper with our Constitution, we will have turned the flag, an emblem of unity and freedom, into a symbol of intolerance. We will not go on record as supporting a proposal which will do what no foreign power and no flag burner has been able to do—limit the freedom of expression of the American people.

AMENDMENTS OFFERED AT MARKUP

During the markup three amendments were offered by Democratic members:

1. Scott Amendment

Description of Amendment: The amendment that would have replaced the word "desecration" with the word "burning" in order to make the proposed amendment neutral with respect to a person's expressive intent.

Vote on Amendment: The amendment was rejected on a party line vote of 11 ayes and 19 nays. Voting aye: Mr. Conyers, Mr. Nadler, Mr. Scott, Mr. Watt, Ms. Lofgren, Ms. Jackson Lee, Mr. Meehan, Mr. Weiner, Mr. Schiff, Ms. Sanchez, and Mr. Van Hollen. Voting Nay: Mr. Coble, Mr. Smith, Mr. Gallegly, Mr. Chabot, Mr. Lungren, Mr. Jenkins, Mr. Cannon, Mr. Inglis, Mr. Hostettler, Mr. Green, Mr. Keller, Mr. Issa, Mr. Flake, Mr. Forbes, Mr. King, Mr. Feeney, Mr. Franks, Mr. Gohmert, and Chairman Sensenbrenner.

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[49] H.Rpt. No. 109–94, at 95–96 (2005).
[50] Roman Rolinick, *Flag Amendment would put U.S. with Iran,* China, UPI (July 1, 1989).
[51] 319 U.S. at 641.

2. Lofgren Amendment

Description of Amendment: The amendment would have specified that the constitutional amendment would not take effect until the date on which Congress by law ensures that the veteran's benefits promised to an individual in connection with that individual's enlistment or induction in the Armed Forces cannot, after that enlistment or induction, be diminished.

Vote on Amendment: Chairman Sensenbrenner sustained an objection to the amendment on the ground that it was not germane to the legislation. A motion to table an appeal of the ruling of the Chair was adopted on a party line vote of 17 ayes and 9 nays. Voting Aye: Mr. Coble, Mr. Smith, Mr. Gallegly, Mr. Goodlatte, Mr. Chabot, Mr. Lungren, Mr. Jenkins, Mr. Cannon, Mr. Inglis, Mr. Hostettler, Mr. Green, Mr. Keller, Mr. Issa, Mr. King, Mr. Franks, Mr. Gohmert, and Chairman Sensenbrenner. Voting Nay: Mr. Conyers, Mr. Nadler, Mr. Scott, Mr. Watt, Ms. Lofgren, Mr. Weiner, Mr. Schiff, Ms. Sanchez, and Mr. Van Hollen.

3. Lofgren Amendment

Description of Amendment: The amendment that would have substituted new language requiring that every flag of the United States manufactured in, or imported into, the United States after the effective date of the amendment must be manufactured out of flame-resistant material.

Vote on Amendment: The Amendment was defeated by a voice vote.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
RICK BOUCHER.
JERROLD NADLER.
ROBERT C. SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
MAXINE WATERS.
MARTIN T. MEEHAN.
WILLIAM D. DELAHUNT.
ROBERT WEXLER.
ANTHONY D. WEINER.
LINDA T. SÁNCHEZ.
CHRIS VAN HOLLEN.

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